DEC 28 1990

BEFORE THE
COPYRIGHT ROYALTY TRIBUNAL

ORIGINAL

SATELLITE CARRIER)
ROYALTY DISTRIBUTION PROCEEDING)

CRT Docket No. 91-1-89SCD

MOTION REQUESTING DECLARATORY RULING
ON ENTITLEMENT TO ROYALTY DISTRIBUTION

Program Suppliers, pursuant to 37 C.F.R. § 301.51, seek a declaratory ruling as to the entitlement of copyright owners of network programs broadcast by network affiliates to share in the royalties collected under 17 U.S.C. § 119 ("TVRO royalties"). The specific question for which Program Suppliers request a declaratory ruling is:

> Are the copyright owners of network programs broadcast by network stations whose signals are retransmitted by satellite carriers to the public for private home viewing persons to whom TVRO royalties may be distributed within the meaning and intent of 17 U.S.C. § 119?

Program Suppliers submit that a declaratory ruling on this question is appropriate in order to remove uncertainty concerning the class of owners entitled to receive TVRO royalties. The 1989 TVRO claims include some that appear to seek to recover royalties for satellite carriage of network programs. The language of § 119 does not clearly permit recovery for network programs. While portions of it can be read to allow such claims, other parts would preclude recovery on this basis. The legislative history does include, however, expressions of Congressional intent not to permit recovery for network programs.

Program Suppliers believe that a declaratory ruling prior to the start of hearings would be an efficient means of resolving any open question on this issue. The filing of claims indicates the matter will be pressed at hearing unless the Tribunal determines now whether network program claims are valid. The issue does not require further factual development, and therefore, does not need to be the subject of an evidentiary hearing. Moreover, a ruling now could reduce the number of participants and contested issues, and thus diminish the burden for the parties and Tribunal at hearing. Finally, an immediate ruling would provide certainty, and thus give clear direction as to the future course to be followed.

THE STATUTORY BACKGROUND

Congress created a new compulsory license with the enactment of the Satellite Home Viewer Act of 1988, Pub. L. 100-667, 102 Stat. 3949. The compulsory license established by this law permits satellite carriers to transmit television station signals to the public for private home viewing. 17 U.S.C. § 119. The scope of the license differs depending on the type of station carried. For independents (or, as they are called in § 119, superstations), the license extends to all areas of the country. § 119(a)(1). For network affiliates, the compulsory license extends only to "white areas," where viewers cannot receive a particular network station via over-the-air signals or from a cable system. § 119(a)(2).

The legislative plan for collection and distribution of TVRO royalties is similar to the plan for collection and distribution of cable royalties under § 111. Satellite carriers must submit statements of account and royalty fees semi-annually. §119(b)(1). The TVRO royalty fees are calculated on a cents per subscriber basis, id., rather than on the basis of gross receipts as is done in § 111. Royalties collected from satellite carriers are invested by the Copyright Office pending distribution by the Tribunal. The filing of claims and distribution procedures at the Tribunal for TVRO royalties are virtually identical to those for cable royalty distribution. See generally §§ 119(b)(2)-(4).

ARGUMENT

I. The Language of Section 119 Is Ambiguous Regarding The Entitlement Of Network Programs to Share In TVRO Royalties

Any right of network program owners to share in TVRO royalty distribution must be derived from a statutory grant. Reading § 119 in its entirety does not clearly grant this right. The royalty payment subsection of § 119 requires a much lower royalty fee for retransmission of network stations than for independents (superstations). This differential is directly attributable to an intent not to require royalties for network programming. The absence of royalty payments for network programming supports a conclusion that distribution of royalties for network programs is not warranted. The royalty distribution subsection, § 119(b)(3), on the other hand, does not expressly

preclude owners of network programming from filing claims, as is the case in § 111(d)(3)(A). It appears from the claims filed for the 1989 TVRO fund that some parties view this omission as allowing claims for network programming.

A. The Statutory Language

The royalty payment subsection of § 119 includes a large differential between the payments for independents (superstations) and those for network affiliates:

> (B) a royalty fee for that 6-month period computed by
> (i) multiplying the total number of subscribers receiving each secondary transmission of a superstation during each calendar month by 12 cents;
> (ii) multiplying the number of subscribers receiving each secondary transmission of a network station during each calendar month by 3 cents.

§ 119(b)(1)(B).

This differential, like that in cable royalty fee payments, is based on the smaller amount of non-network programming offered by network stations as compared to the full schedule of non-network programming on independents. Because Congress did not require royalty fees for network programs, it follows that owners of network programs cannot expect to receive royalty payments for those programs.

The distribution subsection of § 119 does not specify a limitation on those owners who may seek to share in the TVRO royalty fund:

> The royalty fees deposited under (2) shall, in accordance with the procedures provided by paragraph (4), be distributed to those copyright owners whose works were included in a secondary transmission for

> private home viewing made by a satellite carrier . . . .

§ 119(b)(3). This language contrasts with the cable royalty distribution entitlement provision, § 111(d)(3), which limits distribution to owners of non-network programming. Without a limitation on persons entitled to file, it could be argued that owners of network programming are entitled to share in TVRO royalties.

B. How Should The Ambiguity Be Resolved

These two subsections create confusion concerning how network programming should be treated in the TVRO distribution proceedings. If read in the abstract, the royalty payment subsection supports a view that no distribution should be allowed for network programming because Congress did not require payment for this type of programming. If the distribution subsection is read alone, it does not seem to prevent owners of network programming from seeking to share in TVRO royalties.

While both readings might be reasonable in the abstract, the Tribunal has a duty to reconcile them in the context of the entire TVRO royalty plan. This obligation requires the Tribunal to measure each separate reading against the underlying purpose and intent of the overall legislation:

> Each of these possible interpretations of new § 613A can be reconciled with the language of the statute itself . . . . Our duty then is "to find that interpretation which can most fairly be said to be imbedded in the statute in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." The circumstances of

> the enactment of particular legislation may be particularly relevant to this inquiry.

Commissioner of Internal Revenue v. Engle, 464 U.S. 206, 217 (1984) (citation omitted).

In evaluating which meaning better fits the legislative purpose, the Tribunal should use the full array of interpretative guides:

> Even if the language of [the statute] clearly covered [the question at issue], "[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." It is therefore appropriate to turn to our other "traditional tools of statutory construction" for clues of congressional intent.

K-Mart Corporation v. Cartier, Inc., 108 S.Ct. 1811, 1821-22 (1988) (citations omitted). The traditional tools of statutory construction include analysis of the overall structure of the statute and its legislative history:

> Our inquiry into congressional intent must encompass both the particular language, as well as the broader design of the statute. We must also search the available legislative history to shed light on the statutory language.

Georgetown University Hospital v. Bowen, 862 F.2d 323, 326 (D.C. Cir. 1988), aff'd 109 S.Ct. 468 (1989).

II. The Overall Statutory Plan Requires A Conclusion That Congress Did Not Intend Owners Of Network Programming To Share In TVRO Royalties

In looking at the overall context of § 119, it becomes readily apparent that Congress did not intend the owners of network programming to share in TVRO royalties. As in the case

of cable royalties, Congress fashioned the royalty plan around the amount of non-network programming offered by the stations whose signals are retransmitted by satellite carriers for private home viewing. Congress considered that the owners of network programs were fully compensated for the retransmission of their programs through payment of national network fees. Payment of TVRO royalties to owners of network programming in the face of no royalty liability for this programming and Congress' recognition that these owners had already been compensated would be contrary to the overall purpose of the legislation.

A. TVRO Royalty Fees Are Based On The Same Factors As Cable Royalty Fees

The royalty payment provision, § 119(b)(1)(B), requires the payment of 12 cents per subscriber for independents and only 3 cents per subscriber for network affiliates. This is, of course, the same 4:1 ratio of payments found in the distant signal equivalent (DSE) value as defined in § 111(f). In passing § 111, Congress expressly found that lower royalty fees were required for carriage of network affiliates because of the lesser amount of non-network programming carried by these stations.

The legislative history of § 119 makes clear that the same rationale was used in devising the TVRO royalty fees:

> The statutory royalty fees set forth in section 119(b)(1)(B) are twelve cents per subscriber per superstation signal retransmitted and three cents for each subscriber for each network station retransmitted. These fees approximate the same royalty fees paid by cable households for receipt of similar copyrighted signals and are modeled on those contained in the 1976 Copyright Act. Royalty

> fees for retransmission of a network station would be 1/4 those of an independent station, since "the viewing of non-network programs on network stations is considered to approximate 25 percent." H. Rept. 94-1476, 94th Congress, 2d Session [90] (1976).

H.R. Rep. No. 887 (II), 100th Cong. 2d Sess. 22-23, reprinted in 198 U.S. Code Cong. & Admin. News 5638, 5651 (hereinafter "H.R. Rep. No. 887(II), ___").

The lack of payments into the TVRO fund for network programming dictates that no royalty distribution should be made to owners of this type of programming. To do otherwise would require the transfer of payments for retransmission of non-network programming from the owners of these programs to owners of network programming. Nothing in § 119 supports a transfer of owners of royalties from owners of non-network programming to owners of network programming, nor could such a shift be justified on equitable grounds.

B. The Limitation of the TVRO Compulsory License For Network Stations To "White Areas" Does Not Justify Payment Of Royalties To Owners of Network Programming

The compulsory license for retransmission of network stations under § 119 extends only to "white areas." White areas are found wherever the signal of a network station cannot be received over-the-air and where a household is unable to receive that network's programming from a cable system. §§ 119(a)(2) and (d)(10). In contrast, the compulsory license for independents extends throughout the entire country. § 119(a)(1).

It cannot be credibly argued that the lower royalty fee for network stations results from the limited scope of their

compulsory license. Nothing in the statute or the legislative history would support such an argument. As noted on pages 7-8 above, Congress set the fee of three cents for network affiliates at one-quarter of the 12 cents fee for independents because of the lesser amount of non-network programming on affiliates, not because of the limited scope of the compulsory license for affiliates.

A satellite carrier pays the same royalty fee per subscriber in a white area as it pays for subscribers who receive service in places outside the white areas. The effect of the white areas will be to lower the number of TVRO subscribers who can receive network affiliates as compared to the number who can receive independents. As a result, more royalties will be collected for carriage of independent stations. But this has nothing to do with the rate differential between the two types of stations.

The number of subscribers who can or do take affiliates or independents is irrelevant to the rate differential. The only rational explanation for the differential, and the one consistent with Congressional intent, is that more non-network programming appears on independent stations, and Congress tied the royalty rates to the amount of non-network programming broadcast on different types of stations. Indeed, this is precisely what was stated in the House Report. H.R.Rep. No.887 (II) at 22-23.

C. Congress Made Clear That Owners Of Network Programs Are Not Entitled To Share in TVRO Royalties

The legislative history of § 119 makes clear that Congress did not intend owners of network programs to receive a share of the TVRO royalties. Payment of fees in white areas was not considered as entitling owners of network programs to share in TVRO royalties:

> The copyright owners of these non-network programs would be entitled to receive compensation for the retransmission of the programs to "white areas." Owners of copyright in network programs would not be entitled to compensation for such retransmissions, since those copyright owners are compensated for national distribution by the networks when the programming is acquired.

H.R. Rep. No. 887 (II) at 23; see also 134 Cong. Rec. H10427 (1988) (Rep. Markey) (same).

Owners of non-network programs are not compensated on a national basis, but are only compensated for those markets in which the programs are actually licensed. The use of non-network programming on network stations carried into white areas makes these programs available in areas for which the owners would not receive any compensation absent § 119 royalties. Thus, Congressional intent to limit royalty payments to owners of non-network programs in white areas is consistent with the compensation pertaining to network and non-network programming.

CONCLUSION

The overall structure and plan of royalty fee payment and distribution plan of § 119 limits royalty distribution to the owners of non-network programming. The royalty fee payment plan is based on the amount of non-network programming carried, so that the royalty fee for network stations is significantly lower than that for independent stations. The lack of payment for network programming is indicative of Congressional recognition that owners were already compensated for full national carriage of network programs in their network license fees. Because of this compensation, Congress made clear its intent that the owners of non-network programs not receive any further compensation through TVRO royalties.

Program Suppliers submit that the Tribunal should issue a declaratory ruling indicating that owners of network programs are not entitled to share in royalties under § 119.

Respectfully submitted,

HOLLAND & KNIGHT

Arthur Scheiner
Dennis Lane
888 Seventeenth Street, N.W.
Suite 900
Washington, D.C. 20006
(202) 955-5550

Attorneys for PROGRAM SUPPLIERS